In the United States Court of Federal Claims

No. 05-1163C
(Filed: January 29, 2008)

MARSHALL KENNETH FLOWERS,	*
	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

ORDER

Before the court are plaintiff's Motion to Reassign Case From the Honorable Judge Margaret M. Sweeney Pursuant to Rules of Court 40.1(a) ("Pl.'s Mot." or "motion") and defendant's Response to Plaintiff's Motion to Reassign ("Def.'s Resp." or "response").[1] In his motion, plaintiff requests that the court transfer his case to another judge because, according to plaintiff, "prejudice and bias have been exercised and implemented" by the court. Pl.'s Mot. 1. Plaintiff states that transfer is necessary due to, among other things, "undue and unnecessary delay for [a] decision after my final reply [was] filed in the court." Id. at 2. Based upon plaintiff's allegations of judicial bias and citation to Rule 40.1(a) of the Rules of the United States Court of Federal Claims ("RCFC"),[2] the court also addresses the issue of judicial recusal or disqualification under 28 U.S.C. § 455 (2000). For the reasons set forth below, the court denies plaintiff's motion.

[1] Plaintiff did not file a reply brief, which was due on January 22, 2008.

[2] RCFC 40.1(a) provides: "After the complaint has been served on the United States, or after recusal or disqualification of a judge to whom a case has been assigned, the case shall be assigned (or reassigned) forthwith to a judge at random." (emphasis added). The court notes that RCFC 40.3 governs "Complaints Against Judges" and provides notice of the procedures for filing complaints of judicial misconduct.

Background

Plaintiff filed a complaint in the United States Court of Federal Claims ("Court of Federal Claims") on October 31, 2005. Originally assigned to another judge, the case was reassigned, pursuant to RCFC 40.1(b), to the undersigned on January 10, 2006. In his motion, plaintiff "raise[s] numerous questions regarding transfer of this case . . . and the United States (present administration) [sic] impact on what is assumingly independent judicial decisions absence [sic] outside influences." Pl.'s Mot. 2. Plaintiff attributes an unfavorable determination by the court in its Opinion and Order dated March 1, 2007, as the impetus by which the "U.S. Government continues to engages [sic] in deceitful tactics and . . . covert and overt actions that interfered with the sanity of a family relationship." Id. at 7. Plaintiff alleges that the court's delay in issuing a decision regarding plaintiff's pending claims "cause[d] interferences with litigation here in Australia where the government participated in actions to undermine the case presentation and discovery."[3] Id. Such alleged delay by the court, plaintiff maintains, "is discriminatory, meant to prejudices [sic] and limit my ability to litigate parental issues in Australia and live with my son and continue the government cover-up and unfair administration of justice." Id. at 7-8.

Plaintiff argues that the court has demonstrated "unwarranted bias and prejudices" on account of issuing "premature orders absent [his] response, and obviously overlook[ing] and/or indulg[ing] in behaviors prejudicial to the fair administration of justice." Id. at 2. In support of these allegations, plaintiff accuses the United States Army and Department of Justice of "utiliz[ing] their office influences on persons and the Honorable U.S. Courts to specifically undermine [his] case." Id. He argues that these agencies "intentionally omitted administrat[ive] records for the purposes of establishing a record unwarranted of appeal through power of the judiciary,"[4] id. at 2, and cites instances wherein the court granted defendant's motions for extension of time and to supplement the administrative record prior to receipt of plaintiff's responses or objections, id. at 3-5. Plaintiff also claims that, on numerous occasions, he never

[3] The court issued an Opinion and Order adjudicating plaintiff's remaining claims on January 18, 2008.

[4] Plaintiff again repeats these unfounded allegations. Plaintiff objected to the filing of the administrative record when defendant filed a motion for leave to file the administrative record. In response to plaintiff's objections, the court invited plaintiff to supplement the administrative record, which plaintiff did on September 19, 2006. Plaintiff has been afforded the opportunity to correct what he believes were omissions in the administrative record.

received defendant's pleadings,[5] id. at 5. Plaintiff nonetheless acknowledges that the court had previously granted him at least one extension of time. Id. at 6.

Lastly, plaintiff argues that "there appears and exist[s] an appearance of unethical behavior by the court . . . ." Id. at 5. He maintains that his case was reassigned to the court "for purposes of prejudicial administration of justice," id. at 6, and that the court's Opinion and Order dated March 1, 2007, reflects a "discriminatory and selective process," id. at 7. In its response, defendant states that plaintiff "has not alleged sufficient facts" warranting reassignment on the basis of bias and prejudice. Def.'s Resp. 1.

Assignment and Transfer of Cases

RCFC 40.1 governs assignment and transfer of cases. Subsection (a) requires that a case be assigned to a judge at random after the complaint has been served on the United States and be reassigned to a judge at random after recusal or disqualification of a judge to whom a case has been assigned. RCFC 40.1(a). Subsection (b) permits transfer of a case from the assigned judge to another judge upon the agreement of both judges in order

[5] Plaintiff previously notified the court on several occasions that he was not receiving copies of either defendant's pleadings or the court's orders and states in his current motion that "the United States failed to provide pleadings at the address provided and contact me prior to the extensions for enlargement of time . . . ." Pl.'s Mot. 5. The court notes that plaintiff filed notices indicating changes of address or contact information on the following dates: November 15, 2005 (docket no. 3), January 4, 2006 (docket no. 8), March 9, 2006 (docket no. 19), May 18, 2006 (docket no. 59), June 5, 2006 (docket no. 68), June 22, 2006 (docket no. 81), July 11, 2006 (docket no. 90), September 1, 2006 (docket no. 99), October 16, 2006 (docket no. 109), June 19, 2007 (docket no. 142), and July 6, 2007 (docket no. 144).

The court previously addressed plaintiff's allegations that he had not received filings on several occasions. For example, in response to plaintiff's claims of non-receipt of filings, the court directed defendant to provide courtesy copies to plaintiff in orders dated April 7, 2006 (docket no. 35), June 9, 2006 (docket no. 72), and October 31, 2006 (docket no. 114). Defendant filed notice of mailing courtesy copies with the court on June 15, 2006 (docket no. 74), and June 16, 2006 (docket no. 76). On October 19, 2006, plaintiff filed a motion for an order to compel defendant to, among other things, effect service by express mail. The court denied this request on October 31, 2006, and instead directed defendant to provide plaintiff with courtesy copies. The court specifically directed the Clerk of the Court to provide courtesy copies to plaintiff in orders dated October 19, 2006 (docket no. 111), November 16, 2006 (docket no. 118), February 5, 2007 (docket no. 121), and March 12, 2007 (docket no. 124). Furthermore, the court offered to provide courtesy copies to plaintiff via facsimile in orders dated April 12, 2006 (docket no. 41), and May 9, 2006 (docket no. 54).

"[t]o promote docket efficiency, to conform to the requirements of any case management plan, or for the efficient administration of justice," and a party may file a motion to transfer pursuant to RCFC 40.2 where related cases are pending before the court. RCFC 40.1(b). Subsection (c) authorizes the chief judge to "reassign" any case where "such action [is] necessary for the efficient administration of justice." RCFC 40.1(c). Since the court finds that none of the reasons set forth in RCFC 40.1(b) warrant transfer of this case to another judge, it turns to the question of whether judicial recusal or disqualification is required such that this case must be reassigned pursuant to RCFC 40.1(a).

Recusal or Disqualification of Judges

Three federal statutes address judicial recusal. The first, 28 U.S.C. § 47 (2000), is not relevant here because it ensures that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." The second, 28 U.S.C. § 144 (2000), addresses "Bias or prejudice of judge," but is applicable only to "a district court."[6] As such, section 144 does not pertain to proceedings in the Court of Federal Claims. Addams-More v. United States, 79 Fed. Cl. 578, 579 n.1 (2007). The third, 28 U.S.C. § 455, has been referred to as "the federal judicial recusal statute" by the United States Court of Appeals for the Federal Circuit, Bieber v. Dep't of the Army, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002); Chianelli v. Envtl. Prot. Agency, 8 Fed. App'x 971, 979 (Fed. Cir. 2001), and is applicable to judges who sit on the Court of Federal Claims, Addams-More, 79 Fed. Cl. at 580.

Section 455 "provides [a] considerably broader scope for claims of prejudice and bias." Glass v. Pfeffer, 849 F.2d 1261, 1268 (10th Cir. 1988); see also In re Antar, 71 F.3d 97, 101 (3d Cir. 1995) (noting that 28 U.S.C. § 455(a) is the "broadest of the federal recusal provisions"). It states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Thus, section 455(a) "addresses the appearance of partiality, in addition to actual bias or prejudice, and not only may be invoked by motion but also requires judges to recuse sua sponte where appropriate." Addams-More, 79 Fed. Cl. at 580. Section 455(a) "has a 'broader reach' that subsection (b)," Liteky v. United States, 510 U.S. 540, 553 n.2 (1994), which enumerates certain

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[6] Section 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144.

circumstances requiring recusal, including "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," 28 U.S.C. § 455(b)(1).[7]

Although both subsections (a) and (b) are somewhat overlapping, Liteky, 510 U.S. at 552-53 (noting that section 455(a) "expands the protection of § 455(b), but duplicates some of its protection as well"), sections 455(a) and (b) "provide separate . . . bases for recusal." Federal Judicial Center, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at 5 (2002). The former deals exclusively with the appearance of partiality in any circumstance and has been described as a "'catchall' recusal provision, covering both 'interest or relationship' and 'bias or prejudice' grounds," Liteky, 510 U.S. at 548 (citing Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858-61 & n.8 (1988)). The latter pertains to conflicts of interest in specific instances. See Federal Judicial Center, supra, at 5. A judge may accept a waiver "[w]here the ground for disqualification arises . . . under subsection (a)," but no judge may accept a waiver of any ground for disqualification provided in section 455(b). 28 U.S.C. § 455(e).

Section 455 employs an objective test for recusal. Raitport v. United States, 33 Fed. Cl. 155, 158 (1995); see also Debra Lyn Bassett, Judicial Disqualification in the Federal Appellate Courts, 87 Iowa L. Rev. 1213, 1227 (2002) (noting that amendments to section 455 by Congress in 1974 "replaced the subjective standard, which left recusal to the judge's discretion, with the more objective standard set forth in the American Bar Association's ABA Model Code of Judicial Conduct"). Section 455(a) requires disqualification where "impartiality might reasonably be questioned," 28 U.S.C. § 455(a) (emphasis added); see also Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 557 (Fed. Cir. 1996) (quoting United States v. Winston, 613 F.2d 221, 223 (9th Cir. 1980)) (adopting the reasonable person standard), and "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew," Liljeberg, 486 U.S. at 860-61. Similarly, the standard for determining disqualification under section 455(b)(1) is whether "a reasonable person would be convinced the judge was biased." Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., 991 F.2d 1249, 1255 (7th Cir. 1993) (emphasis added).

The Supreme Court has held that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current . . . or of prior proceedings, do not constitute a basis for a bias or partiality motion . . . ." Id. Additionally, "'[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some

[7] None of the circumstances enumerated in 28 U.S.C. 455(b)(2)-(5) are applicable in this case. Therefore, the court focuses only upon subsection (b)(1).

basis other than what the judge learned from his participation in the case.'" Charron v. United States, 200 F.3d 785, 789 (Fed. Cir. 1999) (quoting United States v. Grinnel Corp., 384 U.S. 563, 583 (1966)). The Liteky court held that this extrajudicial source factor applies to both sections 455(a) and 455(b)(1). 510 U.S. at 554.

Plaintiff's Motion

In ruling on a motion under section 455, "the court is not required to accept the facts alleged as true." Raitport, 33 Fed. Cl. at 158 (citing Glass, 849 F.2d at 1268). The allegations plaintiff sets forth in his motion do not establish the existence of judicial bias or partiality such that recusal is required pursuant to either section 455(a) or section 455(b)(1). Plaintiff does not assert the existence of any extrajudicial source, which is defined as a source "outside of the official proceedings," United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1994), that could have affected his case. Instead, plaintiff states generally that "ex-parte communication between court clerks, government officials, and ultimately communications with some judges do exist." Pl.'s Mot. 8. While plaintiff alleges that the court improperly relied upon "facts outside of the administrative record," he does not state with any specificity either the facts allegedly derived from outside the administrative record or the sources of those facts. Id. Nonetheless, plaintiff maintains that these "facts outside of the administrative records . . . ma[de] a fair and impartial judgment based upon the administrative records far from reality." Id. Additionally, plaintiff claims that defendant has "a significant influence on the administration of justice as demonstrated by . . . judicial selection of favorable judges (particular[ly] all Bush appointees) to decide issues . . . ." Id. at 6. These statements do not establish the existence of bias or prejudice such that recusal or disqualification is necessary under 28 U.S.C. § 455.

The Supreme Court has cautioned that "[i]t is wrong in theory . . . to suggest, as many opinions have, that 'extrajudicial source' is the only basis for establishing disqualifying bias or prejudice." Liteky, 510 U.S. at 551. Thus, where a plaintiff does not cite an extrajudicial source of alleged bias or prejudice, he must prove that judicial opinions and remarks "display a deep-seated favoritism or antagonism" or "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. at 555. Plaintiff's allegations fail to meet this high standard. Instead, plaintiff argues that the court "allowed the government to file . . . incomplete [a]dministrative [r]ecords,"[8] Pl.'s Mot. 5, which he alleges the court "discriminatorily applied and hastily printed for publication" in the court's Opinion and Order dated March 1, 2007, id. at 7. While plaintiff may express displeasure with an unfavorable ruling issued by this court, his motion contains not one allegation of "deep-seated favoritism" toward one party that warrants recusal. Instead, plaintiff's motion questions the court's Opinion and Order dated March 1, 2007, which he believes was not fair, just, or correct. Id. at 9. As discussed above, judicial rulings alone do not require recusal. Liteky, 510 U.S. at 555.

[8] See supra note 4.

"Almost invariably," the Liteky court admonished, adverse judicial rulings provide "proper grounds for appeal, not for recusal." Id. Therefore, plaintiff fails to set forth grounds requiring the court's recusal or disqualification from this case.

Conclusion

None of the reasons provided in RCFC 40.1(b) warrant transfer of this case to another judge of the court. Furthermore, plaintiff alleges no facts that would convince a reasonable person that the court exhibited bias or prejudice in either its Opinion and Order dated March 1, 2007, or administration of this case. Pursuant to RCFC 40.1(a), reassignment cannot be effectuated absent recusal or disqualification. Since plaintiff has provided no sufficient grounds of bias or prejudice, the court will not recuse itself from this case. Therefore, plaintiff's motion is **DENIED**.

IT IS SO ORDERED.

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MARGARET M. SWEENEY
Judge